

Tax Type: Sales Tax
Issue: Interstate Commerce (Exemption Issue)
 Drive Away Decals

THE DEPARTMENT OF REVENUE)	Docket #
OF THE STATE OF ILLINOIS)	
)	IBT #
v.)	NTL #
)	
ABC ENTERPRISES, INC.)	Barbara S. Rowe
Taxpayer)	Administrative Law Judge

Appearances: Mr. Sanford J. Poger, The Poger Group and Mr. E. Frederick C. Gain, Attorney at Law, for the taxpayer ABC Enterprises, Inc.; Mr. Charles Hickman, Special Assistant Attorney General for the Illinois Department of Revenue.

The Illinois Department of Revenue (hereinafter referred to as the "Department") issued an Audit Correction and/or Determination of Tax Due to ABC Enterprises, Inc. (hereinafter referred to as the "Taxpayer") for the period of July 1994 through March 1997. The taxpayer timely protested the notice and an evidentiary hearing was held. At the hearing the parties agreed that the deductions claimed in error should be reduced and the only issue was the applicability of drive away decals and the interstate commerce exemption for the sales of all terrain vehicles when they are sold to the taxpayer's out of state purchasers. After reviewing the record, it is recommended that the portion of the liability in question relating to the sale of all terrain vehicles to the taxpayer's out-of-state customers be dismissed.

FINDINGS OF FACT:

1. The *prima facie* case of the Department was established by the admission into evidence of the Audit Correction and/or Determination of Tax Due issued by the Department to the taxpayer on May 13, 1998, in the amount of \$17,972.00 inclusive of penalties and interest. The liability established was for the period of July 1994 through March 1997. (Dept. Ex. No. 1; Tr. p. 37)

2. The breakdown of the correction and/or determination of tax due shows deductions claimed in error of \$415.00 and a tax liability in the amount of \$14,745.00 for sales of all terrain vehicles (hereinafter referred to as "ATVs") which were picked up in Illinois by the taxpayer's out of state customers. The auditor determined that the taxpayer claimed those sales as interstate commerce in error on ST-556 forms. Regarding the deductions claimed in error amount, additional information was submitted by the taxpayer to the Department to substantiate that the amount of those deductions should be reduced from \$415.00 to \$117.00. The Department so agreed. (Dept. Ex. No. 2; Tr. pp. 6, 17-29, 32-33)

3. The only issue addressed at the hearing is the \$14,745.00 amount of tax liability and whether it is appropriate to apply the interstate commerce exemption for motor vehicles to the sale of ATV's picked up in Illinois by out-of-state customers of the taxpayer who were issued a drive-away decal. (Tr. pp. 9-10)

4. The taxpayer is in the business of selling hardware, flowers, jewelry, auto service, ATVs, and motorcycles. (Dept. Ex. No. 1; Tr. p. 18)

5. The taxpayer and Department agree that the transactions at issue were sales of ATVs to out-of-state customers of the taxpayer that were delivered to the customers in Illinois and that the taxpayer issued drive away decals to those customers. (Tr. pp. 18-25, 32-33)

CONCLUSIONS OF LAW:

The Retailers' Occupation Tax Act imposes a tax on the sale of tangible personal property by a person engaged in the business of selling. 35 **ILCS** 120/2. Exemptions from taxation for the sales of certain tangible personal property are available under specified circumstances. The exemption at issue is found at 35 **ILCS** 120/2-5, which states in part:

§ 2-5. Exemptions. Gross receipts from proceeds from the sale of the following tangible personal property are exempt from the tax imposed by this Act: . . .

(25) A motor vehicle sold in this State to a nonresident even though the motor vehicle is delivered to the nonresident in this State, if the motor vehicle is not to be titled in this State, and if a driveway decal permit is issued to the motor vehicle as provided in Section 3-603 of the Illinois Vehicle Code¹ or if the nonresident purchaser has vehicle registration plates to transfer to the motor vehicle upon returning to his or her home state. The issuance of the driveway decal permit or having the out-of-state registration plates to be transferred is *prima facie* evidence that the motor vehicle will not be titled in this State. 35 **ILCS** 120/2-5(25)

This exemption requires the sale and delivery of a motor vehicle in this state to an out of state resident who has a driveway decal and who will not be titling the vehicle in Illinois. The exemption goes on further to state that the issuance of the driveway decal permit is *prima facie* evidence that the motor vehicle will not be titled in this State.

Section 3-603 of the Illinois Vehicle Code, which is referenced in the exemption statute above states:

Application for driveway decal permits. (a) A dealer who has sold a vehicle of a type otherwise required to be registered under this act to a nonresident of this State who does not have currently valid registration in his home state, may provide for the operation of such vehicle without registration from the place of sale to the place of destination outside of the State of Illinois, by endorsing the date of sale on a driveway decal containing the dealer's name, address and license number and by affixing the decal to such vehicle in the manner

¹ 625 **ILCS** 5/3-603.

prescribed in Section 3-413. Any vehicle being operated pursuant to a driveaway decal permit may not be used for any other purpose and such permits shall be effective only for a period of 10 days from the date of sale.

(b) Any dealer may make application to the Secretary of State upon the appropriate form for driveaway decal permits for motor vehicles sold by such dealer. Along with such application each applicant shall submit proof of his status as a bona fide dealer and any other information as may be required by the Secretary of State. (625 **ILCS** 5/3-603)

Exemption statutes are to be strictly construed and all debatable questions are to be resolved in favor of taxation. Wyndemere Retirement Community v. Department of Revenue, 274 Ill.App.3d 455 (2nd Dist. 1995, *leave to appeal denied* 164 Ill.2d 585)

The briefs of the taxpayer and Department address the issue of whether an ATV is a motor vehicle for the purposes of the tax exemption. They also address the definition of the word motor vehicle.

A motor vehicle is defined in the Illinois Vehicle Code (625 **ILCS** 5/1-100 *et seq.*) as:

Every vehicle, which is self-propelled, and every vehicle which is propelled by electric power obtained from overhead trolley wires, but not operated upon rails, except for vehicles moved solely by human power and motorized wheelchairs. (625 **ILCS** 5/1-146)

Further, the Code defines an ATV as:

Any motorized off-highway device 50 inches or less in width, having a manufacturer's dry weight of 600 pounds or less, traveling on 3 or more low-pressure tires, designed with a seat or saddle for operator use, and handlebars or steering wheel for steering control. 625 **ILCS** 5/1-101.8.

The taxpayer relies on two cases in which the Illinois Appellate Courts have found that an ATV was a motor vehicle. In People v. Martinez, 296 Ill.App.3d 330 (2nd Dist. 1998) the court rejected Martinez's argument that an ATV is not a motor vehicle because the Code contains a separate definition of an ATV. The court held that ATV's are a subset of the general category of motor vehicles and found that Martinez should be indicted for driving with a suspended license when he drove the ATV on a public street in Bensenville.

Similarly, in Roberts v. Country Mutual Insurance Company, 231 Ill.App.3d 713 (3rd Dist. 1992) the court found that an ATV was a motor vehicle under the vehicle code. Under the

insurance policy at issue in the case, a motor vehicle was defined as "' a land motor vehicle designed for use principally on public roads'" (*Id.* at 716). The court found that the ATV at issue therein was not designed for that use. Therefore under the terms of the insurance policy, Roberts' ATV was not a motor vehicle. However, the court went on further to find that the Illinois Vehicle Code broadly defines the term motor vehicle and the definition "clearly includes this ATV." (*Id.*) The definition in the Illinois Vehicle Code discussed by the court in Roberts is the same as the one referred to above.

The Department in its reply brief concedes that ATVs are defined under the Illinois Vehicle Code as motor vehicles. (*See* Dept. 2/28/00 brief p. 2) The Department's exemption provision at issue incorporates a reference to the Illinois Vehicle Code. I therefore find that the definition adopted in the vehicle code is appropriate in this instance and that an ATV is a motor vehicle.

The Department admitted that the taxpayer issued drive away decals to the taxpayer's out of state customers that took possession of the ATVs in Illinois. However, the Department argues that the taxpayer cannot meet the requirement regarding the issuance of a driveaway decal as provided in §3-603 of the Illinois Vehicle Code. This argument is premised on the theory that in order to qualify for a driveaway decal, the vehicle must be of a type otherwise required to be registered, and only highway vehicles may be registered pursuant to Illinois Vehicle Code §3-402(A).

Section 3-402 (625 **ILCS** 5/3-402) of the Illinois Vehicle Code deals with vehicles subject to registration and exemptions. In part it states:

A. Exemptions and Policy. Every motor vehicle, trailer, semitrailer and pole trailer when driven or moved upon a highway shall be subject to the registration and certificate of title provisions of this Chapter except. . .

The Department then goes on to assert that because ATVs may not be lawfully operated on the highways pursuant to Vehicle Code §11-1426(a) they are not eligible for registration pursuant to the Vehicle Code §3-402(A) and that the driveaway decals were not legally issued.

Section 5/11-1426 of the Vehicle Code (625 ILCS 5/11-1426) addresses the operation of all terrain vehicles on streets, roads and highways. It states:

(a) Except as provided under this Section, it shall be unlawful for any person to drive or operate any all terrain vehicle . . . upon any street, highway or roadway in this State.

The same section also provides at subsection (b) for crossings of streets, roads, and highways by all terrain vehicles. At subsections (d) and (e) are provisions added by Public Act 90-287, §100 effective January 1, 1998, which allows the corporate authorities of any county, road district, township, city, village, or incorporated town to adopt ordinances or resolutions allowing all terrain vehicles to be operated on designated public highways or streets as egress and ingress routes for the use of the all-terrain vehicles. Therefore, ATVs are allowed to be operated on highways, although only in limited circumstances. The Department argues that is not the equivalent of allowing operation on the highways such as would require license registration.

I do not find the Department's argument about the licensing registration convincing in view of the holding in People v. Martinez, *supra* where the court found that Martinez should be indicted for driving with a suspended license when he drove the ATV on a public street.

For the foregoing reasons, it is recommended that the portion of the liability for the period of 07/01/1994 through 03/31/1997 attributable to the sales of ATVs to out of state residents who were issued a driveway decal by the taxpayer be dismissed.

Respectfully Submitted:

Date: October 6, 2000

Barbara S. Rowe
Administrative Law Judge